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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 610

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, Petitioner

v.

ELINOR M. RATAY, Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Your petitioner complains that the granting of a new trial by the Court of Appeals was not in accordance with the rule laid down in *United States v. Atkinson,* 297 U. S. 157 (cert. to 5th Cir.); that the result is in conflict with *Palmer v. Hoffman,* 318 U. S. 109 (cert. to 2nd Cir.); that Rule 51 has impliedly been abrogated; that the decision is in conflict with other circuits and, finally, that the Court of Appeals reevaluated the testimony and became the trier of fact.

In *Atkinson,* the trial court read into the war risk insurance policy a definition of total disability pursuant to a regulation of the Veterans Administration which was authorized by statute. Accordingly, the court then

instructed the jury that total loss of hearing would be considered total disability, to which the Government failed to object and was thereafter precluded from raising it on appeal. However, the definition of total disability with respect to loss of hearing was included in the Veterans Administration regulation and, more than likely, the Government made timely objection to the inclusion of the regulation in the policy contract, to no avail. But regardless, if the Government had objected to the instruction, the result would have been no different since the alleged fundamental issue in the case was the admissibility of the Veterans Administration regulation. It is clear that the failure to object to the instruction, even if meritorious, could not change the result: *Willis v. P&R,* 269 F. 2d 549 (4th Cir.); *Curd v. Todd-Johnson,* 213 F. 2d 864 (5th Cir.); *CN&W R.R. v. Green,* 164 F. 2d 55 (8th Cir.); *Allen v. Nelson,* 207 F. 2d 296 (10th Cir.); *Shimabukuro v. Nagayama,* 140 F. 2d 13 (D. C.), cert. den. 322 U. S. 755.

In *Shimabukuro*:

> "The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case.
>
> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived below may be considered on review. Mr. Justice Black has recently said:
>
> 'There may always be exceptional cases or particular circumstances which will prompt a

> reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.'
>
> "Heretofore this court has noticed error which parties waived by failure to object at the trial court, to avoid injustice in criminal cases. There is no logical reason for refusing to exercise our power to notice fundamental error in cases where personal or property rights are involved, and our Rule 17(i), which states the principle, makes no distinction between civil and criminal actions.
>
> "The power to notice error waived by the parties should be sparingly used, but the case before us is one which justifies its exercise. The verdict is based on memoranda which strain credulity. * * *"

The instant case is clearly within the exception to the rule in *Atkinson* inasmuch as the jury was not given the proper yardstick with which to measure the quality of the testimony relating to fraud. Obviously, the result could have been different if the jury were instructed that the defendant had the burden to prove fraud by evidence clear, precise and indubitable rather than by a preponderance of the testimony. It is clear that in accordance with Rule 61 the court's action was not inconsistent with substantial justice since the erroneous instruction clearly affected the jury's findings.

Mr. Justice Douglas in *Palmer v. Hoffman,* supra, opined:

> "'Mere "technical errors" which "do not affect the substantial rights of the parties" are not sufficient to set aside a jury verdict in an appellate court. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'" 40 U. S. Statutes 1181 (28 USCA §391)

In *United States v. Nikrasch,* 367 F. 2d 743 (7th Cir.), where the court made findings without a jury, it was held under Rule 52 (b) that the court may notice "plain errors or defects affecting substantial rights." Here certain serial numbers were improperly obtained resulting in a confession to which no objection was made, and the court held that the judgment was reviewable even if no exceptions were filed for the purpose of determining whether or not the evidence warranted the findings.

In *Limandri v. Brasileiro,* 316 F. 2d 3 (2nd Cir.), Judge Clark said:

> "As we have said over and over, particular legal theories of counsel must yield to the overall duty of the court to afford the relief to which the facts entitle a plaintiff."

Gins v Mauser, 148 F. 2d 974 (2nd Cir.); *Siegelman v. Cunard,* 221 F. 2d 189 (2nd Cir.).

Respondent urges that the instant case comes within the exception stated in *Atkinson,* hence the court sua sponte properly ordered a new trial. It cannot be seriously questioned that where the erroneous instruction clearly leads the jury astray, the substantial rights of the plaintiff were adversely affected. Petitioner argues that in *Sibbach v. Wilson & Co., Inc.,* 317 U. S. 1 (cert. to 7th Cir.) errors of law by the court in matters other

than the charge can be corrected sua sponte by an appellate court with greater liberality "because such errors could not readily be obviated by bringing them to the attention of a trial judge." This is specious reasoning since the petitioner complains about the lack of uniformity in the circuits in applying Rule 51. In fact, he argues that any relaxation of the rule is violative of the Seventh Amendment in that the court then becomes the trier of fact!

Petitioner misconstrues *Sibbach* where the court distinguishes between "substantive rights" and "procedural rights" (order to submit to physical examination). The court held that if the trial judge has committed fundamental error the Court of Appeals must decide whether on the whole record the likelihood of a miscarriage of justice is such as to warrant review of error even in the absence of objection or exception at trial: *Blier v. U. S. Lines,* 286 F. 2d 920 (2nd Cir.), cert. den. 368 U. S. 836.

It is clear that in each case where the application of Rule 51 is in question, the trial court's error must be examined to determine if the substantial rights of the parties are materially affected.

In *McNello v. Kelly,* 283 F. 2d 96 (3rd Cir.), the trial court failed to charge adequately on the law of negligence relating to the required standard of proof; and although no protest was made, the error was considered so fundamental as to require reversal.

In *Callwood v. Callwood,* 233 F. 2d 784 (3rd Cir.), the appeals court held that the failure of the court to charge adequately was fundamental error and highly prejudicial, resulting in a gross miscarriage of justice.

In the instant case, the charge was clearly erroneous and goes much further than those cases where the charge is merely inadequate. In *Ostrov v. Metropolitan Life Insurance Company,* decided June 27, 1967, reported unofficially in 7 CCH Life Cases 2d 753, the court instructed the jury that fraud need only be proved by a fair preponderance of the evidence which was held to be fundamental error in accordance with the law of Pennsylvania and the cases cited therein. Accordingly, the Court of Appeals granted a new trial.

In *McCandless v. United States,* 298 U. S. 342 (cert. to 9th Cir.), the court held that Section 269 of the Judicial Code, as amended, provided that judgment on review shall be given after an examination of the entire record "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties," does not change the well settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *United States v. River Rouge,* 269 U. S. 411; *Fillippon v. Albion,* 250 U. S. 76; *Williams v. Great Southern,* 277 U. S. 19.

And in *United States v. McNally,* 342 F. 2d 198 (10th Cir.), the court said: "Erroneous instructions are grounds for reversal unless it affirmatively appears from the record as a whole that the substantial rights of the parties are not affected. . ." (Rule 61, F.R.C.P.) See *McCandless,* supra, and *Fillippon v. Albion,* supra.

In *Mazer v. Lipschutz,* 327 F. 2d 42 (1964) (3rd Cir.), cert. den. 385 U.S. 833, the court held that an appellate tribunal may in its discretion disregard the fed-

eral rule relating to the necessity of objections to instructions where the error claimed is plain and may result in a miscarriage of justice.

In *Schabo v. Mercer,* 333 F. 2d 971 (1964) (3rd Cir.), the court held that the charge was clear and explicit in every detail as to negligence, proximate cause, contributory negligence, etc., hence the verdict was not disturbed, not having been determined to be fundamentally unfair.

In *Crespo v. Firemen's Fund,* 318 F. 2d 174 (9th Cir.) (1963), the appellant complained of a portion of the charge relating to the definition of "trailer" which was not raised in accordance with Rule 51. The appellant contended that the court's failure to properly instruct the jury on the manner of resolving ambiguities in an insurance policy was error; but the decision held that even if there was compliance with Rule 51, such failure to instruct was not reversible error.

The law of Pennsylvania is quite clear in that fraud must be established by evidence that is clear, precise and indubitable. The petitioner urges that the affirmance of the respondent's fourth point for charge (43a) invited the error in question. An examination of the point delineates the quantum of evidence necessary in accordance with the law of Pennsylvania, but the quality of same must meet the standard of "clear, precise and indubitable."

An examination of the decisions in the several circuits and, more especially, the decisions in the 3rd Circuit, indicates that they are not in conflict with each other and with Rule 51 as interpreted by the Supreme Court. While it is true perhaps that in some circuits

there is more strict adherence to Rule 51, an examination of the cases enables the conclusion that each case rests on its own foundation howbeit there may be some difference of opinion on what constitutes the substantial rights of the parties.

In conclusion, the decisions do not abrogate the 7th Amendment and no not indicate that the courts have usurped the function of the jury. An examination of the entire record for the purpose of determining whether errors have been committed affecting the substantial rights of the parties is a question of law.

The petitioner is urging that in all cases, regardless of the circumstances, the charge, the evidence or whatever else might occur during a trial, unless specific objection is taken to any alleged errors, the appellate courts should never review even to ascertain if the substantial rights of the parties have been in any manner violated. This position, if upheld, would disrupt the entire federal judicial process.

It is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

SAMUEL J. GOLDSTEIN
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